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No. 92-708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SELOX INC., A Corporation,

Petitioner,

vs.

THOMAS A. J. FAUSEK, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Sixth Circuit

REPLY OF PETITIONER TO BRIEF
IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

GARY D. LANDER
DAVID R. EVANS
Counsel of Record
CHAMBLISS & BAHNER
1000 Tallan Building
Two Union Square
Chattanooga, Tennessee 37402
Telephone: (615) 756-3000

Counsel for Petitioner
Selox, Inc.

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Selox, Inc. ("Selox")[1] submits the following points in reply to arguments first raised by the Respondents in the Brief in Opposition.

1. Petitioner Has Not Waived Its Attorney-Client Privilege.

Respondents argue that a recent production of documents listed on deposition Ex. 456 (App. 42a) by former counsel to defendant Robert E. White is a voluntary waiver by Selox of its privilege claims mooting the issues in this case. Their argument misstates the facts regarding the production and is legally wrong.

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[1] Pursuant to Rule 29.1 of this Court, reference is made to page ii of the Petition for Writ of Certiorari for Petitioner's list of corporate affiliates.

First, the motion to compel at issue also sought production of the documents listed on Ex. 456 (See App 36a, 37a). Only after the Magistrate's Order compelling discovery had been affirmed by the Sixth Circuit did Miller & Martin relinquish the documents on Ex. 456 on the advice of their attorneys after respondents' counsel had demanded them pursuant to the judgment of the Sixth Circuit (App. 15a) and the outstanding subpoena (App. 30a).[2]

Under these facts, the recent production of documents on Ex. 456 was not undertaken by Selox and in no event was voluntary. Therefore, the cases cited by Respondents (Brief at 9) are inapposite. *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) held that when defendants in a civil action had voluntarily supplied certain documents to the Securities and Exchange Commission and to a grand jury in an effort to avert an investigation, they could not later prevent production of those documents by their counsel on the basis that their prior voluntary disclosure was a "limited" waiver of the privilege. 738 F.2d at 1370.

In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), also cited by Respondents, involved a grand jury subpoena for 6 documents resisted by a company on ac-

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[2] Selox also notes that neither the motion nor the Magistrate's Order (App. 19a) supports Respondents' contention (Brief at 9) that the privileged documents on Ex. 456 covered every privileged area of questioning the Magistrate has compelled attorney Richardson to answer. Further, many of the documents on Ex. 456 were designated as withheld from production by defendant White from his files as not responsive to the request for production made when Selox was not a party. They were simply not Selox's documents to produce or withhold at any time.

count of attorney-client privilege. The Government sought to overcome the corporation's attorney-client privilege claim on the basis of an inadvertent disclosure of one document. The case does not, as Respondents suggest, support broad waiver of all privilege claims from the inadvertent waiver as to one document, much less apply to an involuntary, compelled production.

Respondents may not bootstrap an argument from the two cases they cite that disclosure of certain of White's documents by his former counsel pursuant to subpoena and court order constitutes a waiver by Selox of its privilege claims. The law is to the contrary. In *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1466 (1983) appeal after remand 727 F.2d 941, *cert. denied*, 469 U.S. 819, 105 S.Ct. 90, 83 L.Ed.2d 37 (1984), the Tenth Circuit noted that "because an attorney cannot waive the client's consent, *Republic Gear Co. v. Borg Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967), production of privileged documents by an attorney under court order does not necessarily constitute a waiver of the privilege. *Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978) [("party does not waive the attorney-client privilege for documents he is *compelled* to produce.")]; *Teachers Insurance and Annuity Assoc. v. Shamrock Broadcasting Co.*, 521 F.Supp. 638, 641 (S.D.N.Y. 1981); cf. *United States v. Fusaro*, 708 F.2d 17, 25 n. 3 (1st Cir. 1983)." 723 F.2d at 1466. (footnote omitted).

In *Ward v. Succession of Freeman*, 854 F.2d 780, 788 (5th Cir. 1988), the court held that defendants did not waive their claims of privilege on appeal by making use at trial of privileged communications

which the district court had compelled them to disclose. *See also Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989) (compelled disclosure of privileged work product in one case over objection and reasonable steps to protect privilege does not waive privilege before another court.)

2. The Issues Raised By Petitioner Are Not Moot.

The compelled and involuntary production of documents discussed above does not render Selox's claims moot because the deposition has not been resumed and trial has not even been scheduled. Even if the deposition goes forward pending a ruling by this Court, if Selox prevails on its appeal, the lower courts could provide relief by upholding the privilege claims for the testimony, requiring the return of privileged documents, and prohibiting the use of the privileged deposition testimony at trial. *See Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895). This Court recently reaffirmed this principle in *Church of Scientology of California v. United States*, ___ U.S. ___, 61 U.S.L.W. 4003 (No. 91-946 11-16-92), holding that a third party's compliance with an IRS summons order for tapes in its custody did not moot the appeal of the Church contesting the legality of the summons order. The availability of a partial remedy was deemed sufficient to prevent the case from being moot.

3. Respondents' Suggestion Of Independent Grounds Supporting The Sixth Circuit Decision Is Spurious.

Respondents suggest two "independent" grounds for upholding the decision below. Neither ground was mentioned in the Sixth Circuit's opinion, and Respondents' reliance on them is unsupported by any citation to the record below.

First, Respondents suggest that Selox failed to demonstrate the applicability of the attorney-client privilege as to each of the questions Richardson refused to answer (Brief at 20). Suffice it to say that when this matter was argued before the Magistrate, Selox's counsel urged without contradiction by Respondents' counsel that there was no question on the record made in the deposition that privilege was asserted by Richardson because it existed in that the communications at issue were with corporate officers, with no one else present. The Magistrate concurred in this assertion. (See pages 81-82 of the Transcript of the argument before the Magistrate attached to this Reply Brief A1-A2.).[3]

Respondents are equally in error in urging that the crime-fraud exception to privilege supports the decision of the Sixth Circuit, citing *In re Antitrust Grand Jury*, 805 F.2d 155, 162-3 (6th Cir. 1986). (Brief at 21). In fact, the Magistrate cited this case in his Order but found that "the facts of *In re Antitrust* are not analogous to those of this matter," (App. 26a), relying on the case only for its analysis of the standard required to overcome the privilege. (*Id.*). Respondents did not appeal this finding to the Sixth Circuit, which also did not rely on the crime-fraud exception. The record adduced in support of the motion to compel

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[3] Respondents' representation that Selox instructed Richardson not to answer or to produce documents in blanket fashion is false. The deposition was defended by White's counsel. Richardson refused to answer specific questions, and in each case carefully stated whether he was claiming White's privilege, Selox's privilege, or both. Respondents append nothing from the actual deposition to their Brief because the transcript belies their assertion.

led the Magistrate to state that "the undersigned is mindful of the fact that Selox is not a defendant in this action and no wrongdoing on the part of the corporation has been alleged." (App. 27a). There is no basis for the suggestion that the Magistrate's Order against Selox's claim of privilege, and hence the Sixth Circuit decision, are supportable under the crime-fraud exception.

4. Respondents' Statement Of The Case Underscores The Absence Of Any Detailed Findings Of Fact Which Would Support The Magistrate's Decision.

Respondents' statement of the case contains many serious allegations, most of which are enlivened with the spice of repeated charges of fraud. Selox cannot respond to these charges within the space permitted. Suffice it to say, however, that the charges are untied to the record, inherently contradictory and vigorously disputed by Selox. Indeed, the Magistrate explicitly noted that Selox was not charged with any wrongdoing. (App. 27a).

The important point to be made about the Respondents' allegations is they have no bearing on the question of whether the writ of *certiorari* should or should not be granted. If anything, the Respondents' inability to tie the charges to the record underscores the absence of any detailed findings of fact to support the Magistrate's Order. The petition for a writ of *certiorari* should be granted so that this Court can provide appropriate guidance to the lower courts as to the minimal procedural requirements which must be met before an order may issue breaching an attorney-client privilege under *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied* 401 U.S. 974, 28 L.Ed.2d 232, 91 S.Ct. 1191 (1971).

5. Respondents' Efforts To Misstate Tennessee Law Underscore The Absence Of Any Fiduciary Duty Upon Which Justify The Application of Garner To Private Litigation Not Involving Matters Of General Corporate Governance.

Respondents' arguments regarding Tennessee law do not address *Shaw v. Cole*, 132 Tenn. 210, 177 S.W. 479 (1915) or the Sixth Circuit's selective editing of *Johns v. Caldwell*, 601 S.W.2d 37 (Tenn. App. 1980). Instead, Respondents simply attempt to obscure *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977), which the Sixth Circuit had previously chosen to ignore despite Selox's citation of the case as the concluding leg of a trilogy.

Respondents' efforts to misstate *Vance* are patently deficient for two reasons. First, the issue in *Vance* was whether plaintiff's claim for having been induced to sell his stock at too low a price could be predicated upon the breach of fiduciary duties as opposed to fraud. The Tennessee Supreme Court concluded that it could not. Secondly, Respondents fail to address or give meaning to the Tennessee Supreme Court's footnote in *Vance* indicating that the harshness of the common law rule has been ameliorated by statutory disclosure requirements.

Having failed to distinguish *Vance* in any meaningful way, Respondents tacitly concede the point by arguing that the fraud alleged in this case is somehow different because they have chosen to append a "squeeze-out" epithet to the fraud charge (Brief at 16). Respondents do not claim, however, that any of them were involuntarily parted from their shares by way of a merger, share exchange or corporate dissolution. More importantly, Respondents have cited

no Tennessee authority which defines or recognizes a separate and distinct cause of action for "fraudulent squeeze-out" as opposed to simple "fraud."

The issue related to the breach of Selox's attorney-client privilege was whether Selox owed Respondents any fiduciary obligations with respect to the purchase and sale of their stock in the company. Tennessee has plainly answered this question in the negative. This law applies with equal force to Selox's officers and directors. Even if it did not, however, the breach of any fiduciary duties by White as an officer, director or majority shareholder of Selox would not be chargeable to the corporation. Cf. *Howing v. Nationwide Corp.*, 927 F.2d 263, 267 (6th Cir. 1991); *Radol v. Thomas*, 772 F.2d 244, 258 (6th Cir. 1985), *cert. denied* 477 U.S. 903, 106 S.Ct. 3272, 91 L.Ed.2d 562 (1986).

Conclusion

The writ of *certiorari* should be granted.

Respectfully submitted,

GARY D. LANDER
DAVID R. EVANS
Counsel of Record
CHAMBLISS & BAHNER
1000 Tallan Building
Two Union Square
Chattanooga, Tennessee 37402-2502
Telephone: (615) 756-3000

Counsel for Petitioner
Selox, Inc.

Dated: December 8, 1992

APPENDIX

* * * *

THE COURT: ALL RIGHT. NOW, DO YOU INSIST THAT THE—IS YOURS AN ACADEMIC OBJECTION OR, OR DO YOU INSIST THAT THOSE QUESTIONS WOULD REQUIRE AN ANSWER THAT WOULD VIOLATE THE SELOX PRIVILEGE?

MR. LANDER: WELL, FIRST OF ALL, THAT WAS MY NEXT POINT I WAS GOING TO MAKE IS THAT SELOX ASSERTS TODAY RESPECTFULLY, AND WE'VE NEVER SEEN A CASE CITED FOR THE PROPOSITION THAT THE CLIENT HAS TO DO MORE THAN ASSERT THAT CONFIDENCE AS BEING INQUIRED INTO IN ORDER TO RESERVE THE CONFIDENCE. WE DO NOT HAVE TO SHOW ADDITIONAL PREJUDICE TO OUR CLIENT BEYOND THE INTRUSION ITSELF INTO THE ATTORNEY-CLIENT PRIVILEGE, WHICH MY CLIENT IN ITS PRESENT MANAGEMENT—

THE COURT: I THINK THAT'S RIGHT; AND ALL YOU GOT TO DO IS SAY IT, AND THEN HE'S GOT TO GET AROUND IT SOME WAY.

MR. LANDER: AND I DON'T THINK THERE WAS ANY QUESTION ON THE RECORD THAT WAS MADE IN THE DEPOSITION, YOUR HONOR, THAT THE PRIVILEGE, UNLESS IT WAS TAKEN AWAY EITHER UNDER THE GARNER THEORY OR UNDER THIS OTHER THEORY OF CONFLICT, THE PRIVILEGE WAS ASSERTED BECAUSE IT EXISTED. THESE WERE COMMUNICATIONS THAT I'M CONCERNED WITH BETWEEN EITHER ROBERT WHITE AS AN EXECUTIVE OF SELOX WITH HIS LAWYER, NO ONE ELSE PRESENT, OR MR. TOM LOWE.

THE COURT: I THINK THAT'S RIGHT. I THINK ALL YOU GOT TO DO IS SAY IT, BUT I'M ASKING YOU NOW AS A PRACTICAL MATTER DO YOU THINK THAT ANY OF THOSE QUESTIONS ASK FOR BREACH OF THE SELOX PRIVILEGE?

MR. LANDER: LET ME BE VERY PRECISE HOW I ANSWER THIS.

THE COURT: ALL RIGHT.

MR. LANDER: MR. RICHARDSON—AND I'M GOING TO CITE TO THE COURT IN A MINUTE—MR. RICHARDSSON TESTIFIED OR STATED IN HIS DEPOSITION THAT CERTAIN OF THE QUESTIONS ASKED HIM WOULD CAUSE HIM TO BREACH A CONFIDENCE, A CONFIDENCE COMMUNICATION THAT BELONGS TO SELOX; THAT HE THOUGHT THAT THE QUESTIONS THAT HE WAS BEING ASKED ABOUT INVOLVED A COMMUNICATION TO HIM BY A CORPORATE OFFICER OF SELOX INVOLVING SELOX'S LEGAL AFFAIRS; SO, SO, FIRST OF ALL, I MUST SAY THAT MR. RICHARDSON SAID THAT IT DID.

NOW, I WILL NOT—IN ALL CANDOR, I WILL TELL THE COURT I HAVE ALSO INTERVIEWED MR. RICHARDSON; AND I, I DON'T WANT TO SAY ANYTHING ABOUT WHETHER OR NOT I HAVE PERSONAL KNOWLEDGE OF WHAT THE ANSWERS WOULD BE.

THE COURT: ALL RIGHT.

MR. LANDER: BUT I WILL ASSERT THAT IT'S MORE THAN AN ACADEMIC QUESTION, IF WE NEED MORE. I THINK WE HAVE THE RIGHT TO ASSERT IT; BUT BEFORE I FORGET TO DO IT—

THE COURT: OF COURSE, THE GUY WAS A CHIEF EXECUTIVE OFFICER OF SELOX AT THE TIME HE WAS DOING ALL.

* * * *